No. 83-633

In the Supreme Court of the United States

OCTOBER TERM, 1983

ROBERT K. BELL ENTERPRISES, INC., PETITIONER

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the district court properly declined to entertain a suit to quash an executed administrative inspection warrant, issued under the Occupational Safety and Health Act of 1970, and to suppress evidence obtained during the inspection, where judicial review of the validity of the warrant is available in the court of appeals as part of the Act's administrative enforcement process.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is reported at 710 F.2d 673. The order of the district court (Pet. App. C1-C5) is unofficially reported at 1981 O.S.H. Dec. (CCH) para. 25,433.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 1983. A petition for rehearing was denied on July 27, 1983 (Pet. App. B1-B2). The petition for a writ of certiorari was filed on October 17, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Robert K. Bell Enterprises, Inc. operates an amusement park in Tulsa, Oklahoma. On August 24, 1978, a compliance officer of the Occupational Safety and Health Administration (OSHA) inspected petitioner's premises

pursuant to an inspection warrant based on employee complaints of unsafe conditions. Pet. App. A2-A3, C1-C3.[1] As a result of the inspection, the Secretary, on August 30, 1978, issued a citation charging petitioner with violations of the Act (*id.* at A3, D6). Petitioner filed a timely notice of contest to the citations on or about September 16, 1978, thereby invoking the jurisdiction of the Occupational Safety and Health Review Commission (the Commission) (*ibid.*).[2]

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[1]The Secretary is authorized to conduct administrative inspections of workplaces by Section 8(a) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 657(a), which provides:

> In order to carry out the purposes of [the Act], the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized—
>
> (1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and
>
> (2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent, or employee.

Pursuant to Section 8(f) of the Act, 29 U.S.C. 657(f), which is set forth in pertinent part at Pet. viii-x, the Secretary is also required to conduct administrative inspections in response to an employee complaint. This Court has previously examined the Secretary's authority to inspect worksites in *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978).

[2]The Act provides for an administrative enforcement process followed by judicial review. After inspecting a workplace, the Secretary is empowered under the Act to issue citations to an employer for violation of the Secretary's regulations or the Act's "general duty" clause (29 U.S.C. 654(a)(1)). The citation must specify safety and health violations and fix reasonable abatement times for the correction of these violations, and may propose penalties. 29 U.S.C. 657(a), 658(a), 659(a). Citations that are not contested by the employer within 15 working days become final. 29 U.S.C. 659(a). If the employer timely notifies the

2. On November 2, 1978, petitioner filed this action for declaratory and injunctive relief in the United States District Court for the Northern District of Oklahoma, seeking to quash the warrant and suppress the evidence obtained in the course of the inspection (Pet. App. A3-A4, C2). The Commission stayed the administrative proceedings pending resolution of the district court proceedings (*id.* at A4, C2-C3).

On May 20, 1981, the district court dismissed petitioner's action on the ground that petitioner had failed to exhaust its administrative remedies (Pet. App. C1-C5). The court, therefore, left petitioner to pursue its claims through the "comprehensive scheme" of administrative and judicial review "created by Congress for matters of this type" (*id.* at C4-C5).

3. The court of appeals affirmed (Pet. App. A1-A8), holding that where the administrative process has been commenced, an employer must exhaust its administrative remedies in proceedings before the Commission before contesting the constitutionality of an inspection warrant in judicial proceedings. The court noted that its decision was in accord with the decisions of six other circuits, which have

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Secretary of his intention to contest a citation, he is afforded a hearing before an administrative law judge. 29 U.S.C. (& Supp. V) 659(c), 651(b)(3), 661. The judge's report becomes a final order of the Occupational Safety and Health Review Commission unless a Commissioner directs further review. 29 U.S.C. (Supp. V) 661(i); 29 C.F.R. 2200.90. If the employer is not satisfied with the Commission's disposition of his claim, he may obtain review of the order in the court of appeals. 29 U.S.C. 660(a). The decision of the court of appeals is reviewable in this Court on a writ of certiorari. 29 U.S.C. 660(a); 28 U.S.C. 1254(1). See generally *Atlas Roofing Co.* v. *OSHRC*, 430 U.S. 442, 444-447 (1977).

held that a district court should decline to exercise jurisdiction in these circumstances. *Id.* at A7-A8.[3] The court rejected petitioner's effort to distinguish those decisions as unpersuasive, and it expressly declined to follow the contrary ruling of the Seventh Circuit in *Weyerhaeuser Co.* v. *Marshall*, 592 F.2d 373 (1979), stating that it preferred to follow the rule requiring exhaustion of administrative remedies.

ARGUMENT

The decision of the court of appeals is correct, is in accord with the decisions of six other courts of appeals, and does not warrant review. Indeed, the Court has already declined to review a claim identical to the one presented by petitioner. *Mosher Steel Co.* v. *Donovan*, cert. denied, 454 U.S. 893 (1981).

1. The doctrine of exhaustion of administrative remedies is well established, both in the administrative context generally, *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938), and in the OSHA context in particular. *Frank Irey, Jr., Inc.* v. *Hodgson*, 354 F. Supp. 20 (N.D. W. Va.) (three-judge court), aff'd, 409 U.S. 1070 (1972); *In re Restland Memorial Park*, 540 F.2d 626 (3d Cir. 1976). The court below properly concluded (Pet. App. A6-A7) that the comprehensive scheme of administrative and judicial review provided by Congress affords petitioner an adequate administrative remedy requiring exhaustion.

As the courts have recognized, important policy considerations require exhaustion in these circumstances. See, *e.g.*, *Baldwin Metals Co.* v. *Donovan*, 642 F.2d 768, 771,

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[3]The court of appeals noted (Pet. App. A5 n.*) that the Secretary's citation against petitioner was vacated by an administrative law judge on the ground that the Secretary failed to show that petitioner is an employer affecting interstate commerce. The Secretary's appeal to the Commission from that order is still pending.

773 (5th Cir.), cert. denied, 454 U.S. 893 (1981); *Marshall* v. *Whittaker Corp.*, 610 F.2d 1141, 1148 (3d Cir. 1979). First, an exhaustion requirement protects the autonomy of agency proceedings. Where Congress has "enacted a specific statutory scheme for obtaining review, * * * the doctrine of exhaustion of administrative remedies comes into play and requires that the statutory mode of review be adhered to notwithstanding the absence of an express statutory command of exclusiveness." *Whitney National Bank* v. *Bank of New Orleans*, 379 U.S. 411, 422 (1965). See *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958). Congress established the Occupational Safety and Health Review Commission as a central forum for adjudication of all citations issued by the Secretary for violation of the Act's safety and health requirements. In creating this enforcement mechanism, Congress struck a balance between the need for swift implementation of abatement orders and the provision of due process protections for affected employers. Interference with this scheme by employers seeking to invoke the powers of the district courts to quash executed warrants "might well sunder the statutory balance" (*Babcock & Wilcox Co.* v. *Marshall*, 610 F.2d 1128, 1140 (3d Cir. 1979)), and " 'would afford much opportunity for abuse for dilatory purposes, to the detriment and possible disruption of effective law enforcement' " (*id.* at 1141, quoting *In re Worksite Inspection of Quality Products, Inc.*, 592 F.2d 611, 616 (1st Cir. 1979) (footnote omitted)). Accordingly, exhaustion is "required as a matter of preventing premature interference with agency processes." *Weinberger* v. *Salfi*, 422 U.S. 749, 765 (1975).

Second, the exhaustion requirement offers the possibility of mooting the constitutional issue. See *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U.S. 752, 772-773 (1947); *Allen* v. *Grand Central Aircraft Co.*, 347 U.S. 535, 553 (1954). An agency resolution favorable to the employer on

the merits of the citation, for example, would make the relief sought by the employer redundant and would accordingly obviate the need for a judicial determination of the constitutionality of the warrant. See *Baldwin Metals Co.* v. *Donovan*, 642 F.2d at 771-772; *Babcock & Wilcox Co.* v. *Marshall*, 610 F.2d at 1138. Cf. *In re Worksite Inspection of Quality Products, Inc.*, 592 F.2d at 616; *Marshall* v. *Central Mine Equipment Co.*, 608 F.2d 719, 722 (8th Cir. 1979). This is consistent with the well settled practice of avoiding constitutional adjudication whenever possible. See *Ashwander* v. *TVA*, 297 U.S. 288, 346-347 (1936) (Brandeis, J., concurring).[4]

Nor do any of the recognized exceptions to the exhaustion requirement apply here. Exhaustion is not required where there is no available administrative remedy, *Greene* v. *United States*, 376 U.S. 149, 163-164 (1964), where the available administrative remedy is inadequate to prevent irreparable harm, *McNeese* v. *Board of Education*, 373 U.S. 668, 674-676 (1963), or where blatant violations of constitutional or statutory rights have taken place. *First Jersey Securities, Inc.* v. *Bergen*, 605 F.2d 690, 696 (3d Cir.

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[4]The possibility of mootness is manifest in the instant case, since an administrative law judge has in fact vacated the Secretary's citation. See note 3, *supra*. Unless the Secretary prevails in appealing the interstate commerce issue, the termination of the administrative proceedings will moot the need for judicial resolution of the constitutional questions arising from the issuance of the warrants. See *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 244 n.11 (1980); *McKart* v. *United States*, 395 U.S. 185, 195 (1969); *Babcock & Wilcox Co.* v. *Marshall*, 610 F.2d at 1138.

The theoretical possibility, adverted to by petitioner (Pet. 14), that an action for damages could be brought under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), does not prevent the constitutional issue from being mooted in the statutory enforcement proceedings. Even assuming that a *Bivens* action could be brought in the OSHA context, petitioner did not request damages in its complaint.

1979), cert. denied, 444 U.S. 1074 (1980); *Fitzgerald* v. *Hampton*, 467 F.2d 755, 768 (D.C. Cir. 1972). Here, however, it is clear that the administrative remedy is adequate. Requiring exhaustion will not irreparably injure the employer, because the alleged constitutional violation has already occurred and because the employer may obtain complete relief on its constitutional claims in the court of appeals. 29 U.S.C. 660(a). In addition, the record contains no evidence of disregard by OSHA officials for the constitutional rights of petitioner, much less of blatant violations. The inspection in this case was conducted in furtherance of the Secretary's responsibility for insuring the health and safety of employees in the nation's workplaces and pursuant to a warrant obtained in good faith from the appropriate judicial officer.

The court below was also correct in holding (Pet. App. A7-A8), as have other courts of appeals in similar cases, that the district court should in any event have declined to exercise its equitable jurisdiction to entertain the suit. See *Baldwin Metals Co.* v. *Donovan*, 642 F.2d at 775-777; *Marshall* v. *Central Mine Equipment Co.*, 608 F.2d at 721-722; *In re Worksite Inspection of Quality Products, Inc.*, 592 F.2d at 615-616. A district court's power to consider the admissibility of evidence in a separate proceeding is exceptional in nature; it has been termed the "anomalous" jurisdiction (*Lord* v. *Kelley*, 223 F. Supp. 684, 688 (D. Mass. 1963), appeal dismissed, 334 F.2d 742 (1st Cir. 1964), cert. denied, 379 U.S. 961 (1965)), and its exercise is subject to equitable restraints. *Hunsucker* v. *Phinney*, 497 F.2d 29 (5th Cir. 1974), cert. denied, 420 U.S. 927 (1975). Thus, a district court should decline to exercise its jurisdiction in the absence of a danger of irreparable injury, the possibility of an inadequate remedy at law, or the existence of a callous disregard for constitutional rights. As discussed above (see

page 7, *supra*), none of these prerequisites is met in this case.[5]

2. Petitioner correctly notes (Pet. 7-8) that the decision below is contrary to the Seventh Circuit's decision in *Weyerhaeuser Co.* v. *Marshall*, 592 F.2d 373 (1979), but that conflict does not, in our view, provide a sufficient basis for review by this Court.[6] As the Fifth Circuit has observed (*Baldwin Metals Co.* v. *Donovan*, 642 F.2d at 772, 774-775), the Seventh Circuit in *Weyerhaeuser* plainly erred in concluding that an administrative decision in favor of the employer would not moot the issue of the constitutionality

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[5]While, as petitioner notes (Pet. 9), the warrant application in this case may not have provided the detailed information suggested by the court in *Marshall* v. *Horn Seed Co.*, 647 F.2d 96, 103 (10th Cir. 1981), that does not reflect a disregard for petitioner's rights. Rather, it results from the fact that the application was filed in 1979 and *Horn Seed* was decided in 1981.

[6]Petitioner also asserts (Pet. 8-16) that the decision below is in conflict with other appellate decisions and with decisions of this Court. This assertion is without merit. The cases cited by petitioner, insofar as they indicate that exhaustion may not be required in instances of clear constitutional violations, are inapplicable to this case because the constitutional issue is not clear-cut and requires factual development. Even assuming, arguendo, that the warrant application did not furnish probable cause, petitioner's workplace is an amusement park open to the public. A factual record is therefore necessary to determine whether petitioner had a reasonable expectation of privacy with respect to the inspected area. As this Court noted in *Barlow's*, "[w]hat is observable by the public is observable, *without a warrant*, by the Government inspector as well." 436 U.S. at 315 (footnote omitted; emphasis added). Cf. *United States* v. *Knotts*, No. 81-1802 (Mar. 2, 1983); *Donovan* v. *Dewey*, 452 U.S. 594, 608-609 (1981) (Rehnquist, J., concurring).

Petitioner's reliance (Pet. 10) on *Dravo Corp.* v. *Marshall*, 5 O.S.H. Cas. (BNA) 2057 (W.D. Pa. 1977), aff'd, 578 F.2d 1373 (3d Cir. 1978), is also misplaced. That case involved a warrant that had not been executed, and the district court was able as a result to prevent the search (and any consequent irreparable harm) from taking place. See also *Cerro Metal Products* v. *Marshall*, 620 F.2d 964, 971 (3d Cir. 1980).

of the warrant. In reaching that conclusion, the Seventh Circuit purported to distinguish between the injury resulting from the citation and the injury resulting from the inspection itself, and held that while a Commission ruling in favor of the employer would relieve the former, it could not moot the latter.

But the relief sought in this case, like that sought in *Weyerhaeuser*, is directed at foreclosing any administrative action based on the fruits of the inspection. Any Fourth Amendment injury caused by an unconstitutional inspection is fully accomplished by the inspection itself and can never be repaired. *Stone* v. *Powell*, 428 U.S. 465, 486 (1976); *United States* v. *Calandra*, 414 U.S. 338, 347-348 (1974); *Linkletter* v. *Walker*, 381 U.S. 618, 637 (1965). Hence, while there is indeed a distinction between the injury resulting from the inspection and the injury resulting from the citation, the declaratory and injunctive relief sought in cases like the one at bar concerns solely the latter, and any constitutional issue arising from the use of the fruits of the inspection to support the citation is therefore rendered moot by dismissal of the administrative proceedings.[7] See *Baldwin Metals Co.* v. *Donovan*, 642 F.2d at 774; *Babcock & Wilcox Co.* v. *Marshall*, 610 F.2d at 1134.

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[7]The decision in *Weyerhaeuser* was based in part on the Seventh Circuit's belief that no benefit would be derived from requiring exhaustion because the Commission would not rule on the validity of an inspection warrant. 592 F.2d at 376-377. Since *Weyerhaeuser* was decided, the Commission has in fact passed on constitutional questions relating to the use of evidence obtained pursuant to allegedly invalid warrants. See *Baldwin Metals Co.* v. *Donovan*, 642 F.2d at 774 n.11. Regardless of whether the Commission is authorized to decide these questions, the availability of judicial review prevents the employer from suffering irreparable injury as a result of being required to exhaust its administrative remedies.

We note that *Weyerhaeuser* was the first court of appeals decision on the question whether a district court is the proper initial forum to review the validity of an executed OSHA inspection warrant. Since the Seventh Circuit's decision in *Weyerhaeuser*, seven other courts of appeals, including the Tenth Circuit in this case, have considered the question and rejected the Seventh Circuit's analysis. See *United States* v. *Cleveland Electric Illuminating Co.*, 689 F.2d 66 (6th Cir. 1982); *Baldwin Metals Co.* v. *Donovan, supra*; *J.R. Simplot Co.* v. *OSHA*, 640 F.2d 1134 (9th Cir. 1981), cert. denied, 455 U.S. 939 (1982); *Babcock & Wilcox Co.* v. *Marshall, supra*; *Marshall* v. *Central Mine Equipment Co., supra*; *In re Worksite Inspection of Quality Products, Inc., supra*.[8] In light of the overwhelming authority requiring exhaustion, there is no immediate need for this Court to address the issue.

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[8]The Seventh Circuit followed *Weyerhaeuser* in *Federal Casting Division, Chromalloy American Corp.* v. *Donovan*, 684 F.2d 504, 507-508 (1982).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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